and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the Attorney General and ETA shall cease the actions specified in § 655.665.

§ 655.675 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

§ 655.700 What statutory provisions govern the employment of H–1B and H–1B1 nonimmigrants and how do employers apply for an H–1B or H–1B1 visa?

Under the H–1B1 visa, the Immigration and Nationality Act (INA), as amended, permits nonimmigrant professionals in specialty occupations

from countries with which the U.S. has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to temporarily enter the U.S. for professional employment. Employers seeking to temporarily employ H–1B1 professionals must file a labor attestation with the Department of Labor in accordance with this subpart as set out in §655.700(c)(3) and (d), which identify the sections of this subpart H and of subpart I of this part that apply to the H–1B1 program, sections and subsections applicable only to the H–1B program, and how terminology is to be applied. Steps for receiving an H–1B1 visa and entering the U.S. on an H–1B1 visa after the attestation process is completed with the Department of Labor, which differ in some respects from the steps for H–1B visas, are the responsibility of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) and are identified in regulations and procedures of those agencies. Consult the Department of State (*http://www.state.gov/*) and USCIS (*http://uscis.gov/*) websites and regulations for specific instructions regarding H–1B1 visas. Procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in this section and §655.705, apply only to H–1B nonimmigrants, not to H–1B1 nonimmigrants.

(a) *Statutory provisions regarding H–1B visas.* With respect to nonimmigrant workers entering the U.S. on H–1B visas, which are available to nonimmigrant aliens in specialty occupations or certain fashion models from any country, the INA, as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas—

(i) 195,000 in fiscal year 2001;

(ii) 195,000 in fiscal year 2002;

(iii) 195,000 in fiscal year 2003; and

(iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant ;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a ''specialty occupation'' or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035 or ETA 9035E) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035 and ETA 9035E) may be obtained from http://ows.doleta.gov, from DOL regional offices, and from the Employment and Training Administration (ETA) national office.Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see §655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified LCA, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may

apply for an H–1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H–1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§ 655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to ''H–1B nonimmigrant'' apply to any Mexican citizen nonimmigrant who is classified by INS as ''TN.'' In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106–95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

(3) Subject to paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B1 visa classification in specialty occupations in accordance with INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under an agreement listed in INA section 214(g)(8)(A) (8 U.S.C. 1184(g)(8)(A)), and during the period that the listed agreement is in effect. This paragraph is applicable to H–1B1 attestations filed on or after November 23, 2004; H–1B1 attestations filed prior to that date but on or after January 1, 2004, the commencement of the H–1B1 program, will be handled in accordance with the H–1B1 statutory terms and the H–1B1 processing procedures the Department posted on its website in advance of January 1, 2004.

(d) *Nonimmigrants on H–1B1 visas*—(1) *Exclusions.* The following sections and portions of sections in this subpart and in subpart I of this part do not apply to H–1B1 nonimmigrants but apply only to H–1B nonimmigrants: Sections 655.700(a), (b), (c)(1) and (c)(2); 655.705(b) and (c); 655.710(b); the last clause of the second sentence of 655.720(c) (regarding a petition to INS); 655.730(d)(5) and (e)(3); 655.736; 655.737; 655.738; 655.739; 655.760(a)(8), (9) and (10); and 655.805(a)(7), (8) and (9). Additionally, the definition of the Immigration and Naturalization Service in § 655.715 is inapplicable to the H–1B1 program. Further, any of the following references in this subpart H or in subpart I of this part, whether in the excluded sections listed above or elsewhere, do not apply to H–1B1 nonimmigrants but apply only to H–1B nonimmigrants: References to fashion models of distinguished merit and ability (H–1B but not H–1B1 visas are available to such fashion models); references to a petition process before the INS (now USCIS) (the petition process applies only to H–1B not H–1B1 visas); references to H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements (these provisions do not apply to the H–1B1 program); and reference in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) regarding increased portability of H–1B status (by the statutory terms, the portability provision is inapplicable to H–1B1 nonimmigrants).

(2) *Terminology.* For purposes of this subpart H and subpart I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to H–1B1 nonimmigrants and as otherwise excluded:

(i) The term ''H–1B'' shall include ''H–1B1'' (INA section 101(a)(15)(H)(i)(b1)); and

(ii) The term ''labor condition application'' or ''LCA'' shall include a labor attestation pursuant to the provisions of INA section 212(t)(1) with respect to an H–1B1 nonimmigrant professional under INA section 101(a)(15)(H)(i)(b1).

(3) *Filing procedures for H–1B1 labor attestations.* Employers seeking to employ an H–1B1 nonimmigrant must submit to DOL a completed ETA Form 9035 or ETA Form 9035E (electronic) in the manner prescribed in §§ 655.720 and 655.730. Employers must indicate on the form whether the labor attestation is for an ''H–1B1 Chile'' or ''H–1B1 Singapore'' nonimmigrant. Changes in the procedures and instructions for submission of the H–1B1 labor attestation will be provided in a notice published in the FEDERAL REGISTER and posted at the ETA web site at *http://atlas.doleta.gov/foreign/.*

(4) *Employer's responsibilities regarding H–1B1 labor attestation.* Each employer seeking an H–1B1 nonimmigrant in a specialty occupation has several responsibilities, as described more fully in this subpart and subpart I of this part, including:

(i) By completing and submitting the LCA, and in addition by signing the LCA, the employer makes certain representations and agrees to several attestations regarding the employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B1 nonimmigrant (8 U.S.C. 1182(t)(1)). These attestations are specifically identified and incorporated in the LCA, as well as being set forth in full on Form ETA 9035CP.

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS in accordance with the further procedures of those agencies necessary for the nonimmigrant to obtain an H–1B1 visa and enter or remain in the U.S.

(iii) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the filed LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(iv) The employer shall develop sufficient documentation to meet its burden of proof, in the event that such statement or information is challenged, with respect to the validity of the statements made in its LCA and the accuracy of information provided. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

(5) *Application to Chile.* During the period that the provisions of Chapter 14 and Section D of Annex 14.3 of the United States-Chile Free Trade Agreement (Chile FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Chile under the provisions of Article 14.9 and Annex 2.1 of the Chile FTA and who is a professional under the provisions of Annex 14.3(D) of the Chile FTA.

(6) *Application to Singapore.* During the period that the provisions of Section IV of Annex 11A of the United States-Singapore Free Trade Agreement (Singapore FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Singapore under the provisions of Chapter 11 and Section IV of Annex 11A of the Singapore FTA and who is a professional under the provisions of Annex 11A(IV) of the Singapore FTA.

[65 FR 80209, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001; 69 FR 68226, Nov. 23, 2004]

§ 655.705 What federal agencies are involved in the H-1B program, and what are the responsibilities of those agencies and of employers?

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H–1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.